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Infants--Negligence--Standard of Care

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In all of the cases denying the exclusion there was no certainty as to either the duration of the income interest or the amount of the corpus. Specifically, either the length of time the beneficiary was to receive the income was indefinite or the amount of property in the corpus of the trust was subject to invasion. The income interests in the *Rosen* trusts were not so infirmed. The income interests in the *Rosen* trusts were somewhat speculative in nature. Certainly much of their value depended upon future contingencies, but this only made the problem of valuation difficult. The income beneficiaries under each of the *Rosen* trusts had an unqualified right to income for a definite period and no person had the power to destroy the right to receive such income by an invasion of the corpus. Therefore, while the values of the income interests in the *Rosen* trusts were somewhat uncertain, it was the certainty as to duration of interest and certainty as to amount of corpus which distinguished them from the cases cited for the government and made resort to the tables of Treasury Regulation § 25.2512(f) actuarially sound.

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INFANTS-NEGLIGENCE-STANDARD OF CARE

Defendant, an eleven-year-old boy, was playing golf with his mother and two other adults. The plaintiff, about 150 yards away and in plain view, was struck by a golf ball driven by the defendant. The defendant had been playing golf two to three times a week during the season for the past two years, and in view of this, the trial court charged the jury that the infant was to be held to the adult

discretion until mortgages and encumbrances against the trust property were discharged in full in the case of *Commissioner v. Brandegee*, 123 F.2d 58 (1st Cir. 1941).

In *Fischer v. Commissioner*, 288 F.2d 574 (3rd Cir. 1961), the settlor and trustees had the power to invade the principal to make loans, and the beneficiary's interest in this trust was subject to being cut off by any attempt at alienation on his part or by his becoming bankrupt.

In *La Fortune v. Commissioner*, 263 F.2d 186 (10th Cir. 1958), the trustee had the power in his discretion to terminate the trust at any time and in *Vogel v. United States*, 42 F. Supp. 103 (D. Mass 1941), the trustees had the power to alter or amend the trust instrument in whole or in part at any time and to change beneficiaries or adjust the beneficiary's share under the trust. See also *Herrman v. Commissioner*, 235 F.2d 440 (5th Cir. 1956); *Riter v. Commissioner*, 3 T.C. 301 (1944); *Geller v. Commissioner*, 9 T.C. 484 (1947).

standard of care. *Held*, affirmed. Considering the inherent dangers in golf and the defendant's experience, this infant while on the golf course is held to the standard of care of the reasonably prudent adult. *Newmann v. Shlansky*, 294 N.Y.S.2d 628 (Westchester County Ct. 1968).

The general principle that infants and lunatics are liable for their torts¹ raises the question of the standard of care to be used in determining their liability for negligent conduct. At early common law, minors and insane persons were held to the same standard of care as sane adults.² This was changed with respect to infants in the late 1800's³ when a subjective standard was adopted which took into account the child's age, intelligence, and experience, but insane persons must still measure up to the adult standard of care.⁴ With the advent of the automobile, courts again reverted to the strict standard for children by holding children engaged in dangerous adult activities, such as the operation of a motor vehicle, to the standard of care required of adults.⁵

Currently, in a negligence action not involving a dangerous adult activity, an infant is usually held to a standard of care commensurate with his age, experience, and intelligence.⁶ The reasons given for

¹ *Rozell v. Rozell*, 281 N.Y. 106, 109, 22 N.E.2d 254, 255 (1939); *Midkiff v. Midkiff*, 201 Va. 269, 272, 113 S.E.2d 875, 877 (1960); 1 T. COOLEY, *TORTS* § 66 (4th ed. 1932); W. PROSSER, *TORTS* § 32 at 157 (3d. ed. 1964).

² See 3 *TULSA L.J.* 186, 192 (1966).

³ E.g., *Western & Am. R.R. v. Young*, 83 Ga. 512, 518-19, 10 S.E. 197, 198-99 (1889); *Illinois Cent. R.R. v. Slater*, 129 Ill. 91, 99, 21 N.E. 575, 577 (1889); *Briese v. Maechtle*, 146 Wis. 89, 91, 130 N.W. 893, 894 (1911).

⁴ *Johnson v. Lambotte*, 147 Colo. 203, 205, 363 P.2d 165, 166 (1961); *Shapiro v. Tchernowitz*, 3 Misc. 2d 617, 155 N.Y.S.2d 1011, 1014 (Sup. Ct. 1956); *Williams v. Hays*, 143 N.Y. 442, 446, 38 N.E. 449, 450 (1894). See also M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 355-359 (1952); Sadoff, *Tortious Liability of the Insane: A Psychiatric Evaluation*, 39 P.A.B.A.Q. 73 (1967). *Contra*, *Buckley & Toronto Transp. Comm'n. v. Smith Transp. Ltd.*, 4 D.L.R. 721 (1946), a Canadian case holding no negligence where a truck driver under the insane delusion that the truck was under remote control failed to control it.

⁵ E.g., *Dawson v. Hoffman*, 43 Ill. App. 2d 17, 20, 192 N.E.2d 695, 696 (1963); *Betzold v. Ericson*, 35 Ill. App. 2d 203, 209, 182 N.E. 2d 342, 345 (1962); *Dellwo v. Pearson*, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961); *Baxter v. Fugett*, 425 P.2d 462, 464 (Okla. 1967).

⁶ See *Singer v. Marx*, 144 Cal. App. 2d 637, 642, 301 P.2d 440, 443 (1956); *Hoyt v. Rosenberg*, 80 Cal. App. 2d 500, 503, 182 P.2d 234, 236 (1947); *Grenier v. Town of Glastonbury*, 118 Conn. 477, 481, 173 A. 160, 162 (1934); *Charbonneau v. MacRury*, 84 N.H. 501, 510, 153 A. 457, 462 (1931); 1 T. COOLEY, *TORTS* § 66 (4th ed. 1932); W. PROSSER, *TORTS* § 128 (3d ed. 1964); *RESTATEMENT (SECOND) OF TORTS* § 238A, comment b at 15 (1965).

this subjective standard are a common sense evaluation of children's abilities and public policy considerations. An argument often espoused is that extreme youth makes one incapable of appreciating a risk and living up to the adult standard of care.⁷ According to one eminent author, children generally cannot in fact meet the adult standard of care, as they have not the prerequisites of discretion and understanding which develop through experience.⁸ It is also reasoned that holding a minor to an increased standard would open a floodgate of litigation from "play" injuries, resulting in unnecessary judgments against infant defendants. Therefore, seemingly based on the underlying philosophy that the mistakes and failings of children are tolerated as conditions to which every man is heir,⁹ it has been said that if the law of torts held children to the adult standard of care, it would be shutting its eyes "ostrich-like" and unduly burdening infants' growth to majority.¹⁰

Engaging in dangerous adult activities, however, may cause the minor to lose the shield of his youth.¹¹ The lenient standard for infants, adopted before the advent of the automobile, did not take into account the possibility that an instrument as potentially dangerous as a motor vehicle would be readily available to infants.¹² With an increasing participation by infants in some adult fields of conduct, there arose the necessity of balancing the immaturity of children against the damages they caused. Therefore, courts recognized that children engaging in certain dangerous activities which require a minimum degree of competence should be held to the standard of care of the reasonably prudent adult.¹³ Thus arose the double standard of care for infants. When a minor is engaged in common childhood activities, he is judged according to his experience, capacity,

⁷ Dunlop, *Torts Relating to Infants*, 5 W. ONT. L. REV. 116, 117 (1966).

⁸ W. PROSSER, *TORTS* § 32 at 157 (3d ed. 1964).

⁹ J. FLEMING, *THE LAW OF TORTS* 31 (1967).

¹⁰ Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1928).

¹¹ *Dellwo v. Pearson*, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961); 2 F. HARPER & F. JAMES, *TORTS* § 16.8 (1956); *RESTATEMENT (SECOND) OF TORTS* § 283A, comment c at 16 (1965).

¹² Note, *A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity*, 42 IND. L.J. 405, 409 (1967).

¹³ E.g., *Dawson v. Hoffman*, 43 Ill. App. 2d 17, 20, 192 N.E.2d 695, 696 (1963); *Betzold v. Ericson*, 35 Ill. App. 2d 203, 209, 182 N.E.2d 342, 345 (1962); *Dellwo v. Pearson*, 259 Minn. 452, 458, 107 N.W.2d 859, 863 (1961); *Adams v. Lopez*, 75 N.M. 503, 507, 407 P.2d 50, 52 (1965); *Carano v. Cardina*, 115 Ohio App. 30, 33, 184 N.E.2d 430, 432 (1961).

and general understanding, but when engaged in dangerous adult activity, that same child may be held to the adult standard of care.¹⁴

Licensing statutes, such as vehicle operator's statutes, can be considered as another reason for holding infants to a higher degree of care than is otherwise required of the infant. Some cases reason that since an infant is licensed, he has to observe the same standard as all other drivers.¹⁵ But, there are contrary decisions, which hold the minor to a subjective standard by arguing that licensing does not increase one's capacity.¹⁶

The standard used to measure the conduct of a minor engaged in adult activities turns on the ultimate issue of whether courts should continue to recognize that children do not have the same capacity for judgment as an adult or should subordinate this factor to the protection of the public interest of compensation.¹⁷ There appears to be a tendency to hold a minor engaged in adult activity to the adult standard, as evidenced by the numerous cases involving automobiles.¹⁸ It was a small step to extend this standard to other situations, such as the operation of a powerboat,¹⁹ where a child is operating another type of potentially dangerous motorized vehicle. Language such as, "[i]t would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standard of care and conduct than that expected of all others,"²⁰ is used to justify the results.

Newmann v. Shlansky extends the liability of minors even farther. Golf was characterized as an adult activity and the driven golf ball

¹⁴ 12 DE PAUL L. REV. 361, 363 (1963). See also *American Family Ins. Co. v. Grim*, 201 Kan. 340, 440 P.2d 621 (1968) in which an infant, who illegally entered a church with friends, was held liable for his negligence as an adult when torches lit by the others caused damage, because the wrongful act was done in attempting to accomplish an illegal objective.

¹⁵ *Elliot v. Jensen*, 187 Cal. App. 2d 389, 9 Cal. Rptr. 642 (Dist. Ct. App. 1960); *Allen v. Ellis*, 191 Kan. 311, 380 P.2d 408 (1963).

¹⁶ *Harvey v. Cole*, 159 Kan. 239, 153 P.2d 916 (1944); *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457 (1931).

¹⁷ See Note, *A Proposal for a Modified Standard of Care for the Infant Engaged in an Adult Activity*, 42 IND L.J. 405, 412 (1967).

¹⁸ *Dawson v. Hoffman*, 43 Ill. App. 2d 17, 192 N.E.2d 695 (1963); *Betzold v. Ericson*, 35 Ill. App. 2d 203, 182 N.E.2d 342 (1962); *Baxter v. Fugett*, 425 P.2d 462 (Okla. 1967); *Powell v. Hartford Accident and Indem. Co.*, 398 S.W.2d 727 (Tenn. 1967).

¹⁹ *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961).

²⁰ *Id.* at 458, 107 N.W.2d at 863. See also *Dawson v. Hoffman*, 43 Ill. App. 2d 17, 20, 192 N.E.2d 695, 696 (1963).

was considered a dangerous instrument. This objective argument was strengthened by a subjective consideration of the infant. The court alluded to the facts that the infant had played golf for two years, that he played with adults, and that he played as well or better than many adults. The result was that an infant was held to the standard of care of an adult while on the golf course.

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